No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

L. L. PRICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER, UNION PACIFIC RAILROAD COMPANY

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BRIEF FOR PETITIONER, UNION PACIFIC RAILROAD COMPANY

OPINION BELOW

The District Court, in granting petitioner's motion for summary judgment (R. 94, 95), issued no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 101, et seq.) is reported at 255 F. 2d 663. The opinion was rendered on May 20, 1958.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (R. 108). Petition for rehearing was denied on July 7, 1958 (R. 109). The petition for writ of certiorari was filed on October 3, 1958, and was granted on November 17, 1958 (R. 109). On December 10, 1958, the Clerk extended the time for the filing of petitioner's

brief to and including Janary 15, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

A discharged railroad employe voluntarily elected to present the dispute over his discharge, seeking reinstatement and back pay, to the National Railroad Adjustment Board under the provisions of Section 3, First (i) of the Railway Labor Act and that Board made an award denying his claim. He did not challenge the validity of the award on any statutory or constitutional basis, nor did he challenge the procedural regularity of the Board's proceedings. Instead, he filed an action for damages for wrongful discharge against the railroad in which he collaterally attacked the Board's denial award. The questions presented are whether in these circumstances -

(1) a district court has jurisdiction to review the grounds relied upon by the Board in making its denial award and, on the basis of such review, qualify, nullify or disregard the express intention of Congress, set forth in Section 3, First (m) of the Act, that Board awards shall be "final and binding upon both parties;" and whether -

(2) the discharged employe may institute an independent action for wrongful discharge in a U. S. District Court or is he bound by his election.

STATUTE INVOLVED

The statute involved is Section 3 of the Railway Labor Act, as amended (45 U. S. C. § 153; 48 Stat. 1185, 1189), the pertinent portions of which are set forth in Appendix A, *infra*, page 1a.

STATEMENT

This is an action for damages for alleged wrongful discharge brought by respondent L. L. Price against petitioner Union Pacific Railroad Company (hereafter referred to as "Union Pacific") in the United States District Court for the District of Nevada. Jurisdiction is based on diversity of citizenship, Price being a citizen of Nevada and Union Pacific, a Utah corporation (R. 3).

The facts are not in dispute. Respondent Price was employed by Union Pacific as a brakeman at Las Vagas, Nevada. On July 12, 1949, he reported for duty at 9:15 p.m. and was instructed to deadhead on a train from Las Vegas to Nipton, California, a point 56.7 miles west of Las Vegas (R. 6). He arrived at Nipton at about 10:25 p.m. at which time he contacted the train dispatcher and was instructed to stay at that point and to perform service as a "swing" or extra brakeman on a train due there in about six hours (R. 17, 18, 20). Price objected to these instructions and told the train dispatcher that there were no eating and sleeping facilities at Nipton and that he was returning on the first eastbound train to Las Vegas (R. 18).

Price's objection to his instructions was based on his own interpretation of a provision, Article 32(b), of the collective bargaining agreement between Union Pacific and the Brotherhood of Railroad Trainmen (hereafter referred to as "Brotherhood") governing the wages and working conditions of brakemen.[1]

1 Article 32(b) provided: "Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available." (R. 9).

Immediately after Price talked with the train dispatcher, the assistant chief train dispatcher came to the telephone and told Price that he should follow his instructions and "handle any grievance [under the agreement] through his organization, as it should be handled." (R. 27, interpolation.) Price deliberately disobeyed his instructions and returned to Las Vegas (R. 24, 25, 27, 28). Some time after his return to Las Vegas he called the train dispatcher and inquired whether he should return to Nipton (R. 24, 25) and was told not to do so (R. 6, 25).

As a result, Union Pacific charged Price with being insubordinate, failing to comply with instructions and being absent from duty without proper authority, in violation of Union Pacific's Operating Rules 700 and 702. He was directed to appear for an investigation and hearing on such charges which would be held under the provisions of the applicable collective bargaining agreement (R. 13).

The investigation was postponed twice at Price's request (R. 12). However, Price never did appear and the investigation was held in his absence (R. 17, 57). A record of the investigation was transcribed (R. 12-29). On July 24, 1949, Union Pacific discharged Price because of his insubordination (R. 3, 7).

Price requested and authorized the Brotherhood to handle the grievance over his discharge and to seek his reinstatement with pay for all time lost and all other rights restored (R. 51). This grievance was handled in the usual manner between Union Pacific and the Brotherhood (R. 29-38). During such handling, Union Pacific, acting in the belief that the discipline had served its purpose, offered to reinstate Price on a leniency basis, i. e.,

restoration with full seniority rights but without pay for time lost (R. 33). This offer was rejected (R. 34) and on January 11, 1951, Price, again acting through the Brotherhood, elected to refer the dispute over his discharge to the First Division of the National Railroad Adjustment Board (R. 5, 60), in accordance with the provisions of Section 3, First (i) of the Railway Labor Act. The claim submitted to the Board sought Price's restoration to service and pay for all time lost from the date of discharge (R. 5).

In support of his claim, Price relied primarily upon two arguments, first, that he was not insubordinate because the instructions to remain at Nipton were in violation of the labor agreement; and, second, that the provisions of the agreement were not complied with because the investigation was held in his absence (R. 8, 9). Other grounds were also urged. For example, Price also contended that the investigation was not "thorough" as required by the agreement (R. 8), and that the agreement was also violated because Union Pacific advised Price in the letter of charges (R. 15) that he could have such witnesses at the investigation as he desired at his own expense (R. 8).

In the handling before the Board, oral hearing was waived by the parties (R. 12, 57). On June 25, 1952, the Board, with A. Langley Coffey sitting as referee, made an award denying Price's claim for reinstatement and back pay (R. 59). This was National Railroad Adjustment Board, First Division Award 15509, and is printed in the record herein at page 56, et seq.

The decision of the Board consisted of a statement of the claim, the findings and the award. The Board's

award, itself, consisted of but two words "Claim denied" (R. 59).

The findings consisted of certain jurisdictional statements followed by a brief statement of the dispute and a recitation of some of the Board's reasons for its award. In the findings, the Board first discussed the question of Price's failure to follow his instructions, stating that Price "was found to have wilfully disobeyed his orders." The Board said "[t]his was insubordination and merited discipline" (R. 57). The Board then said that the agreement had not been violated when the hearing was held in Price's absence (R. 57-59). The findings contained no discussion of any other points advanced by Price in support of his claim.

Price did not take any action challenging the award for any reason. Almost a year later, he filed the complaint in this action alleging wrongful discharge. He alleged that his dismissal was in violation of the agreement between Brotherhood and Union Pacific and that he was discharged without cause. He sought damages in the amount of $118,517.00 (R. 4-5).

In its answer, Union Pacific denied the allegations in the complaint and alleged that the denial award of the Adjustment Board was a "final and binding" determination of the dispute over Price's discharge under Section 3, First (m) of the Railway Labor Act. It was also alleged that his election to pursue the remedy provided by that Act constituted a bar to his action (R. 68-72). Union Pacific filed a motion for a summary judgment (R. 87, 89) which was granted (R. 94-95) and Price appealed therefrom (R. 95).

The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663 (R. 101). The court held that the Board's denial award did not bar Price's action for wrongful discharge. In its opinion, the court below recognized that the Board had issued an award denying Price's claim for reinstatement and back pay in its entirety (R. 103). Nonetheless, the court said that in order for such denial award to be final and binding under the provisions of Section 3, First (m) of the Railway Labor Act, it must represent an "adjudication on the merits." The court then reviewed part of the record before the Board and decided that Price's dispute tendered two questions, first, whether Union Pacific was entitled to discharge Price because of his failure to follow instructions; and, second, whether Price had been accorded the kind of a hearing provided for in the agreement. In the court's view, the first question constituted the "question on the merits in this controversy" (R. 104).

The court then reviewed the Board's findings in an effort to determine the "grounds relied upon" by the Board in making the denial award (R. 106). It held that, while the Board had concluded the applicable agreement provisions were not violated, the Board had misconstrued Price's submission and had not considered or determined the other question presented; that it did not "appear" that the Board made any determination on the "merits of Price's complaint." The court held that because the Board had not passed on what the court determined to be the merits of the dispute, the award was not "final and binding," that the award was without legal effect and that the District Court had jurisdiction to entertain Price's independent action for damages (R. 105).

Judge Healy, in his dissent, stated that it was plain to him that the Board did hold that Price was not justified in violating his instructions and that the Board did dispose of the "merits" of Price's complaint. Judge Healy observed "[w]ith its intimate knowledge of the field, the Board is peculiarly equipped to make such a decision" (R. 107).

Respondent Price did nothing to challenge the validity of the Board's award on any constitutional or statutory basis. His attack on the award was a collateral one. This attack, adopted by the court below as the basis for its decision, was simply that the Board's findings failed to state explicitly that under the facts Union Pacific was entitled to discharge him because of his failure to follow instructions.

SUMMARY OF ARGUMENT

1. The Railway Labor Act at Section 3, First (m) provides that the awards of the National Railroad Adjustment Board shall be "final and binding upon both parties to a dispute" except where they contain a money award. Thus, awards denying a claim represent a final and conclusive determination of the dispute and are not subject to judical review by the courts.

The plain language of the Act, its purpose and legislative history, as well as its uniform application by the courts, deny any jurisdiction in a court to look behind a Board's denial award in a collateral proceeding to determine the grounds relied upon by the Board in its denial. Further, such court is without jurisdiction to decide that the Board failed to consider and pass upon what the court feels were the "merits" of the dispute and on that basis hold that the award should not be "final and binding."

2. Election of remedies bars a discharged railroad employe from litigating his discharge in a common law action for damages after he voluntarily elected to pursue the remedy provided by the Railway Labor Act to a conclusion and lost before the Adjustment Board.

The election was determined by the act of progressing the dispute to the Adjustment Board. Such act, by and of itself, was decisive and barred subsequent resort to the common law remedy irrespective of the nature of the final disposition of the dispute by the Board. This is especially true here where the remedy elected provided by its terms for the conclusive finality of the award.

3. The remedies provided in the Railway Labor Act to judicially review Adjustment Board awards are limited to those provided in the Act. The general rule that the specification of statutory remedies precludes application of other remedies is rigidly applied in the railroad labor field in matters subject to the Railway Labor Act. Courts are given a minimum responsibility in this field and where judicial remedies are not provided, there are none. The only judicial review provided in the Act is in the case of Adjustment Board awards in favor of the petitioning party before the Board.

4. The decision below will have unfortunate and undesirable effects in the administration of the Railway Labor Act. If allowed to stand, it will prolong disputes and result in litigation, thus frustrating the clear intention of Congress to provide an administrative means for the expeditious and conclusive determination of minor grievances in the railroad industry.

To permit the courts to look behind a Board's denial award and speculate as to what constitutes the "merits"

of a dispute and whether the Board gave consideration to such, will encourage resort to the courts by the losing party before the Board. The decision below can only compound confusion by opening to uncertainty those matters which Congress intended to settle by the creation of the National Railroad Adjustment Board.

ARGUMENT

I. AWARDS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, EXCEPT THOSE CONTAINING A MONEY AWARD, ARE MADE FINAL AND BINDING BY THE RAILWAY LABOR ACT AND ARE NOT SUBJECT TO ANY JUDICIAL REVIEW.

The 1934 amendments to the Railway Labor Act (48 Stat. 1185; 45 U. S. C. § 153), created the National Railroad Adjustment Board and provided for the administrative determination or adjudication of certain disputes between railroads and their employes. The Board is a bi-partisan agency with equal representation of both the railroads and the national labor organizations representing railroad employes.

By Section 3, First (i) of the Railway Labor Act, 45 U. S. C. § 153, First (i), the jurisdiction of the Adjustment Board is limited to what are known in the railroad industry as "minor disputes", i. e., grievances or controversies over the meaning of an agreement provision in a particular fact situation, as distinguished from "major disputes", which, essentially, relate to the making of collective agreements. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722 (1945), affirmed on rehearing, 327 U. S. 661 (1946).

Brief review of the history of the handling of these minor disputes demonstrates that in the establishment of the National Railroad Adjustment Board by the 1934

amendments, Congress intended to create an orderly, certain and conclusive procedure.

Adjustment Boards were created under General Orders Nos. 13, 29 and 53, but these operated only during World War I. See Wolf, The Railroad Labor Board (1927), 50-52. In 1926, the Railway Labor Act (44 Stat. 577) was passed and provided for the establishment of Boards of Adjustment by agreement between railroads, either individually or collectively, and their employes. The Act required that the agreement should provide that the decisions of such Boards would be "final and binding", 44 Stat. 578, Section 3, First (e). But the plan of that Act did not succeed. As indicated, the Boards were to be created by agreement and many carriers would not agree to their establishment.

Finally, in 1934, at the urging of the railroad unions, the Federal Coordinator of Transportation, Joseph B. Eastman, drafted amendments to the 1926 Act which provided, at Section 3, for the creation of the National Railroad Adjustment Board. Either party to a dispute was given the right to refer it to the appropriate division of the Board which was directed to decide such disputes by the making of an award to be final and binding upon the parties.

The 1934 amendments represented a victory for the railroad employes in their efforts to obtain a certain and conclusive method of settling minor disputes through reference to Adjustment Boards established on a national basis. No longer could the settlement of such disputes be defeated by a carrier declining to join in the creation of local Boards of Adjustment. Each party to the dispute may submit it for decision, irrespective of the willingness of the other party. *Elgin, J. & E. R. Co. v. Burley*, 325

U. S. 711, 727 (1945). The creation of the Adjustment Board procedures has been held to preclude a strike over minor disputes pending at the Adjustment Board. In effect, compulsory arbitration was established in this field. *Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30, 39 (1957); *State of California v. Taylor*, 353 U. S. 553, 559 (1957).

These minor disputes, after the required handling on the railroad properties, may, if not settled, be referred by either party to the Adjustment Board. Section 3, First (i), 45 U. S. C. § 153, First (i). It is the duty of the Board to agree upon an award in settlement of the dispute. Where agreement is not reached, a neutral person or "referee"[1] is to be selected either by the Adjustment Board or the National Mediation Board. The referee sits with the division and is required to "make an award". Section 3, First (l), 45 U. S. C. § 153, First (l).

Awards of the Adjustment Board, except where they contain a money award, are final and binding upon the parties. In this regard, Congress, with deliberation and obvious purpose, used explicit and unambiguous language:

> "* * * [T]he awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Section 3, First (m), 45 U. S. C. § 153, First (m).

Since the establishment of the Adjustment Board in 1934, it has never been doubted that non-money awards[2] of the Board are final and binding and conclusive on the parties. It has been consistently held, except where the

2 A denial award in a case where the claim sought a money payment is not a "money award." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), dissenting opinion of Mr. Justice Frankfurter at page 760. *Hargis v. Wabash R. Co.*, 163 F. 2d 608, 614, (C.A. 7, 1947).

validity of such awards are challenged on a statutory or constitutional basis, that the courts are without any power of judicial review thereover. The major reason for this recognition is the explicit and unambiguous provision in the Railway Labor Act at Section 3, First (m) that such awards shall be "final and binding upon both parties to the dispute." In the face of this language, it is impossible to comprehend any other result.

In the *Burley* case, 325 U. S. 711, 720, this Court rejected the argument that Board awards were without legal effect. It was contended that an award of the Board was not a final award but was only advisory. This Court "put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history." Except where the Act provides for judicial review, the Act "purports to make the Board's decisions 'final and binding'." (325 U. S. at page 727.)

Mr. Justice Rutledge, while on the Circuit Court of Appeals for the District of Columbia, wrote the opinion in *Washington Terminal Company v. Boswell,* 124 F. 2d 235 (1941), affirmed *per curiam* by an equally divided court, 319 U. S. 732 (1942). It was there held that Congress did not intend that Adjustment Board awards "should be circumvented by free resort to other forms of judicial review or determination de novo of the merits of the controversy" (p. 240).

More recently, in *Railroad Trainmen v. Chicago River and Indiana R. Co.,* 353 U. S. 30, 34 (1957), this Court again recognized the "unequivocal'" language of Section 3, First (m), in providing that the awards of the "Board are final and binding upon both parties." It is clear from the Court's opinion that such finality provision of the Act

was essential to its decision holding unlawful a strike over grievances pending before the Board.

Mr. Chief Justice Warren, speaking for a unanimous Court, rejected the Brotherhood's argument that there was no compulsion on the Brotherhood to allow the Board to settle the grievances if an alternative method, e. g., a strike, seemed more desirable. This Court said that the language of Section 3, First "reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress." (353 U. S. 30 at page 35.)

Most of the cases in which the Act's finality provision has been applied involve denial Board awards[3] arising generally out of discharge situations. In the typical case, the discharged employe refers the dispute over his discharge to the Adjustment Board seeking reinstatement and back pay. After the Board denies his claim, he brings an action in court. Prior to this Court's decision in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), the relief sought in court was generally the same as that before the Board, namely, for reinstatement and lost pay. Since that decision, it has been limited to damages. Both prior and subsequent to *Slocum*, the courts have rejected any attempt to obtain judicial review of denial Board awards. In most of these cases, such rejection has been on the basis that the "final and binding" provision of the Act precludes any such review. Among these cases are *Reynolds v. Denver & R. G. W. R. Co.*, 174 F. 2d 673 (C. A. 10, 1949); *Weaver v. Penn-*

3 The cases are not limited to awards of the National Railroad Adjustment Board, but also involve awards of System Boards of Adjustment of railroads and airlines established by agreement pursuant to Section 3, Second or 204, Title II of the Railway Labor Act, respectively, such agreements providing, as in Section 3, First (m), that the awards of the Boards would be final and binding on the parties.

sylvania R. Co., 240 F. 2d 350 (C. A. 2, 1957), affirming *per curiam*, 141 F. Supp. 214 (D. C. N. Y., 1956); *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (C. A. 3, 1954), certiorari denied, 348 U. S. 871 (1954); and *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (C. A. 3, 1957).

The *Reynolds* case, 174 F. 2d 673, held the "final and binding" provision of Section 3, First (m) deprived the District Court of jurisdiction in an employe's action for damages brought subsequent to the rendition of a denial award by the Board. The award could not be challenged because the language of the Act was -

> "* * * clear and susceptible only of one construction, namely, that in cases other than where a money award is made the judgment [award] of the Board is final and binding upon the parties thereto." 174 F. 2d 673 at page 675 (interpolation).

The *Bower* case, 214 F. 2d 623, held a discharged airline employe barred from bringing an action at law for damages after an Airline System Board of Adjustment had denied his claim for reinstatement because of the "final and binding" provision of the agreement establishing the Board under Section 204, Title II, of the Railway Labor Act:

> "Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case." (214 F. 2d 623 at page 626.)

In *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579, the plaintiff claimed his discharge violated an agreement to employ him for life. The dispute over his discharge was handled to the First Division of the Adjustment Board where the Board did not even purport to consider the circumstances of his discharge but dismissed it on the basis that the "dispute was settled on the property by and between the parties to the controlling agreement," 245 F. 2d 579 at 580. Plaintiff asked the court to review the Board's decision, contending that the Act was unconstitutional if it were held to provide review for the carrier when the award is in favor of the employe, but no review for the employe when the Board award is in favor of the carrier. This contention was rejected. Judge Goodrich, speaking for the court, said that it was solely up to Congress to prohibit or permit judicial review of non-money Board awards and that the scheme of the Railway Labor Act did not violate constitutional rights. Noting that other courts had based such a conclusion on *res judicata*, as well as the election of remedies doctrine, Judge Goodrich said that there simply was no authority permitting review - "regardless of the path taken judicial authority arrives at the same place" (p. 582).

The operation of the National Railroad Adjustment Board, as well as System Boards of Adjustment, since the passage of the 1934 amendments to the Railway Labor Act and the treatment accorded such Board awards in the cases discussed above,[4] is a necessary recognition of the conclusive finality that Congress intended should apply to these Board decisions and especially, to denial

4 The cases have not been limited to discharge situations. *Hargis v. Wabash Railroad Co.*, 163 F. 2d 608 (C.A. 7, 1947); *Sigfried v. Pan Amer-*

(Continued Next Page)

awards. The decision below would strike in the opposite direction.

Congress told the Adjustment Board to decide these minor disputes - to "make an award." Section 3, First (l). It is the award, the Board's decision, which the Act makes final and binding.

Here, the award of the Board was simply "Claim denied" (R. 59). Instead of recognizing the statutory provision and holding the Board's award "final and binding", the Court of Appeals below reviewed and interpreted not only the Board's findings, but the record of the submissions before the Board as well. (Footnote 5, R. 106.) It acknowledged that the award was an "outright denial of the claim," yet it determined that the Board had "misconstrued" Price's submission and that the Board had failed to discuss, and pass upon, what the court decided was the "merits" of the controversy.

The only requirement in the Act as to awards is that they shall be in writing and copies furnished the parties. Section 3, First (m). Nowhere in the Act is there any requirement that the findings specifically cover every argument advanced in support of a claim; in fact, the Act does not require that findings be made. In *Ramsey v. Chesapeake & O. R. Co.*, 75 F. Supp. 740, 742 (N. D. Ohio, 1948), the court noted that the Board had failed to make specific findings upon all of the facts and issues submitted

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(Footnote 4 Continued)

ican World Airways, 230 F. 2d 13 (C.A. 5, 1956); and *Coats v. St. Louis-San Francisco Railway Co.*, 230 F. 2d 798 (C.A. 5, 1956). State courts have also recognized the finality provisions of the Railway Labor Act. *Stephenson v. New Orleans and North Eastern Railroad Co.*, 180 Miss. 147, 177 So. 509 (1939); *Hicks v. Thompson*, 207 S.W. 2d 1000 (Tex. Civ. App., 1948).

to it, but, nevertheless, held that the denial award was final and binding and precluded any court review.

The decision below is without precedent. No court has held that a District Court has jurisdiction to review the grounds relied upon by an Adjustment Board in making a denial award and, on the basis of such review, invalidate, qualify or disregard the finality provisions of the Act. The court below flatly stated that a Board award, to be final and binding under the Act, "must represent an adjudication on the merits," and cited three cases: *Washington Terminal Co. v. Boswell,* 124 F. 2d 235 at page 249 (1941); *Koelker v. Baltimore & Ohio R. Co.,* 140 F. Supp. 887 at page 889; and *Michel v. Louisville & N. R. Co.,* 188 F. 2d 224 at page 226. (Footnote 4, R. 104.)

Reference was made to page 249 of the decision in the *Boswell* case, which was affirmed by an equally divided court, 319 U. S. 732 (1943). There is nothing at that page touching on the problems involved in the decision below. Moreover, there is actual conflict between the decision below and the principles established in the *Boswell* case which held that a party may not participate in a Board proceeding and then subsequently circumvent the Board's award by judicial proceedings.[5]

In the *Boswell* case, a carrier, after having defended itself unsuccessfully in a dispute referred to the Adjustment Board by the employes, sought to have the Board's

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5 "* * * If a carrier can have full advantage of the administrative proceeding, on the chance it will be successful, yet when the event is otherwise relieve itself of all its disadvantages, circumventing the employee's rights by judicial proceedings in which they are not available, the Railway Labor Act will have become, finally, a dead letter. * * *" 124 F. 2d 235 at page 242.

award and order declared void and requested a declaratory judgment under the involved labor contract within the two-year period which the Act allowed for the successful employe's enforcement suit. The Court of Appeals for the District of Columbia, in a detailed opinion by Mr. Justice Rutledge, held that such an action was not maintainable. The court recognized the action was in essence a suit to review the Board award and it held that such an action was not permitted, that the Act "makes no provision for review as such." The court noted the provisions covering an enforcement action under Section 3, First (p), and concluded that "the method of review provided [in the Act] was intended to be exclusive." (Interpolation, 124 F. 2d at page 240.)

Koelker v. Baltimore & Ohio R. Co., 140 F. Supp. 887 (D. C. Pa., 1956), was a district court opinion. It was not a discipline case. The question, whether the plaintiff had been properly laid off, was submitted to the Third Division of the Board. That Division, unlike the First Division, generally issues an "Opinion of the Board" in addition to findings and an award. The award was not clear. It read "Claim denied in accordance with Opinion and Findings." But in its opinion, the Board indicated that there was no dispute "between parties to the controlling agreement" and the findings said that the Carrier's action "will not be disturbed." (140 F. Supp. 887 at page 889.)

In this situation, the District Court in *Koelker* said there was a dispute over the interpretation of the Board's award and that it would be necessary for one of the parties to request an interpretation from the Board. The court was here referring to Section 3, First (m) which provides for further resort to the Board by the parties in case a dispute arises involving an interpretation of an

award. In the instant case, Union Pacific argued below that Price, if he believed the award did not represent an adjudication on the merits, should have sought an interpretation from the Board. The Court of Appeals below rejected this contention (R. 106).

But the court in *Koelker* did not hold that it had any power to interpret or review the award. It held the case in abeyance to give the plaintiff an opportunity to secure an award in her favor or an interpretation.

The *Koelker* case clearly recognized that the plaintiff could only bring a court action under Section 3, First (p) of the Act and that an award in her favor was necessary to such action. More relevant to the case at bar, the District Court attempted no interpretation or review of the Board award, nor did it allow the law action to be maintained and the effect of the award ignored.

The decision in the *Michel* case (C. A. 5, 1951), 188 F. 2d 224, also cited by the court below, was essentially premised on the doctrine of election of inconsistent remedies which the court said found "strong support" in the finality language of the Act (p. 227). This case is discussed, *infra*, at p. 24, et seq.

The words "final and binding on both parties to the dispute" are so plain in their meaning and indicative of what Congress intended as to make resort to legislative history unnecessary. Nevertheless, the legislative history reinforces that plain meaning.

Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 bill to amend the Railway Labor Act as passed in 1926 testified that the 1926 Act provided that awards of Boards

of Adjustment were to be final and binding and that "[t]hese provisions were regarded, when they were enacted, as a vital and essential part of the act." Hearings before House of Representatives Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. p. 45. He explained that the 1926 Act had failed to successfully provide a means to settle these minor disputes because of the failure to establish Boards of Adjustment.

Referring to the proposed 1934 amendments, Commissioner Eastman stated:

> "In my answer to you I said there was nothing in the act which provided for the enforcement of those particular decisions. *That answer would not apply to decisions of the adjustment board, and they are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters.* They are not the major issues which arise in the labor world. It has to do with the settlement of these grievances." (House Hearings, *supra*, p. 59, emphasis supplied.)

In sum, the Court of Appeals below erred in holding that the District Court had jurisdiction to entertain Price's damage action which was a collateral attack on the "final and binding" character of the award of the Adjustment Board. Moreover, it erred in going behind the Board's denial award, reviewing the record before the Board, deciding what it thought to be the "merits" of

the dispute and then deciding on the basis of certain language in the Board's findings, that the Board had not properly considered the dispute over Price's discharge. This erroneous holding of the court below is contrary to the intent and application of the Railway Labor Act.

II. THE VOLUNTARY ELECTION BY A DISCHARGED RAILROAD EMPLOYE TO PURSUE THE ADMINISTRATIVE REMEDY UNDER SECTION 3, FIRST (i) OF THE RAILWAY LABOR ACT BARS SUBSEQUENT RESORT TO THE INCONSISTENT REMEDY OF A COMMON LAW ACTION FOR DAMAGES FOR WRONGFUL DISCHARGE.

In *Moore v. Illinois Central,* 312 U. S. 632, 634, 636 (1941), this Court said that as to actions for wrongful discharge, the 1934 amendments to the Railway Labor Act in effect supplied an administrative remedy to the discharged employe which was in addition to his right to go into court in a common law action for wrongful discharge. Subsequently, the decision in *Slocum v. Delaware, L. & W. R. Co.,* 339 U. S. 239, 244, made clear the election available to the discharged railroad employe. If he still considers himself an employe and asserts his right to be retained as such, he must go to the Board. If he accepts the discharge as final, he may sue in court for breach of contract. But he may not do both. He may proceed "*either* in accordance with the administrative procedures prescribed in his employment contract *or* he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim." *T.W.A. v. Koppal,* 345 U. S. 653, 661 (1953; emphasis supplied.) See, also, *Adams v. N. Y. C. & St. L. R. Co.,* 121 F. 2d 808, 810 (C.C.A. 7, 1941).

But the establishment of the administrative remedy did not establish a duality of remedies. The Act provides an alternative remedy to an employe who believes

his discharge was wrongful. The administrative remedy and the common law action for damages for wrongful discharge are mutually exclusive and inconsistent. As the Court pointed out in the *Slocum* case, *supra*, "a common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employes" (339 U. S. at p. 244). The Court also recognized that the common law action for wrongful discharge requires the employe's acceptance of his discharge as final. Before the Board, he asserts that he still is an employe.

The Court of Appeals in the decision below noted the doctrine of election available to the discharged employe, but failed to apply it (R. 104). The court also recognized that there was not a duality of remedies, although that is the actual result of its decision. It failed to recognize the conclusive effect of the employe's voluntary election to pursue his administrative remedy under Section 3, First (i) of the Railway Labor Act. That election, by and of itself, barred any subsequent attempt to follow the other remedy, irrespective of the ultimate disposition of the dispute by the Board.

One of the earliest cases involving the application of the doctrine of election of remedies to this situation is *Austin v. Southern Pacific Company*, 50 Cal. App. 2d 29[illegible] 123 P. 2d 39 (1942). There the plaintiff, a discharged employe, sought restoration of his seniority through court action following his attempt to present the dispute over his discharge to the National Railroad Adjustment Board. The Board denied him any relief. The California court noted that Austin had an election to

proceed either in a court action or before the Adjustment Board and held that he "made his election and invoked the Board's jurisdiction." This, it was held, barred the subsequent court action.

In *Michel v. Louisville & Nashville R. R. Co.*, 188 F. 2d 224 (C. A. 5, 1951), the prior resort to the Adjustment Board -

> "* * * evidenced an election of inconsistent remedies in that it was an acceptance of one of the two means afforded by law for redress for any grievance or claim arising out of the alleged unjustified discharge * * *" (p. 226)

and barred the bringing of a court action. The court simply applied the fundamental principle that the election of one of two available inconsistent remedies precluded recourse to the other.

As previously indicated, the *Michel* case was relied upon by the court below as authority for its statement that there must be an "adjudication on the merits" in order for a Board award to be final and binding (footnote 4, R. 104). Decision in *Michel* turned on the basis of his election of inconsistent remedies and was not premised on the finality clause of the Act. That case does not hold that the election of inconsistent remedies is inapplicable unless the award is an adjudication on the merits.

We will hereafter show that the court below misconstrued the use of the word "merits" in the *Michel* decision. However, even adopting *arguendo* the court's misunderstanding, it is clear that the mere observation in the *Michel* decision that the employe's claim had been determined by the Board "upon the merits" does not

make such a fact necessary to the application of the election of remedies doctrine. Such a conclusion is unsupported.

Any possibility that the Court of Appeals for the Fifth Circuit considered such to be of relevance in the application of the doctrine of election of remedies is completely dissipated by its subsequent opinions in *Majors v. Thompson*, 235 F. 2d 449 (1956), and *Wooley v. Eastern Air Lines*, 250 F. 2d 86 (1957). In the *Wooley* case, the court rejected, on the basis of election of remedies, an attempted collateral attack on a Board award, holding that the employe could not go to court after he had elected to go to the Board.

> "* * * If he [the discharged employe] determines that he will treat his grievance as involving a determination of rights as an employe under the bargaining agreement and asserts his rights to be retained as an employe he must go to the board for redress. If he accepts the action of the carrier as a final discharge he may sue in court for a breach of the contract of employment. *He may not do both.*" (250 F. 2d 86, 90; emphasis and interpolation supplied).

In the *Michel* case, there was evidence of some reluctance on the part of Michel's union representative to refer the dispute to the Adjustment Board. Footnote 5, 188 F. 2d 224 at page 226. This factor made relevant to that decision the court's observation that the dispute had been "pursued to a determination of the merits by the Adjustment Board" (page 226). In using that language, the court was merely distinguishing between the Board's handling the dispute to a conclusion instead of dismissing it.

In the instant case, the claim presented to the Board sought Price's reinstatement and pay for time lost. The merits of the dispute before the Board was whether or not Price should be reinstated with pay. That was the ultimate question and the Board answered it in the negative. In its unauthorized quest for the "merits," the court below confused Price's arguments in support of his claim with the ultimate question of his reinstatement. But the Adjustment Board necessarily adjudicated the merits of Price's claim for reinstatement by denying it.

The two main contentions relied upon by Price in support of his claim were simply supporting arguments, although one of them did involve the actual circumstances of his discharge. Neither of those two contentions can be properly said to be the "merits" of the claim to the exclusion of the other. Had the Board agreed with Price on any of his arguments, the claim would have been sustained and Price reinstated with back pay.

Petitioner submits that Award 15509, denying Price's claim, was a complete disposition of the dispute. The Board's findings do not show otherwise. It was conceded by all parties and recognized by the court below that Award 15509 was an "outright denial" of Price's claim (R. 106). But, in any event, respondent's argument that the Board had failed to consider one of Price's contentions is irrelevant to the application of the doctrine of election of remedies. Once Price chose to present his case to the Board, he was precluded from his resort to court action. The nature of the final disposition by the Board does not affect the matter.

It has long been recognized that an election to pursue one of two inconsistent remedies precludes resort to the

other without regard to the result of such pursuit. This Court, in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 301 (1922), held that the nature of the final disposition was of no consequence in applying the doctrine of election of remedies:

> "* * * But the election was determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court."

In *Robb v. Vos*, 155 U. S. 13, 43 (1894), this Court reviewed the cases on the question and said that any decisive act determines the election of inconsistent remedies. See, also, *Pennsylvania R. Co. v. Clark Coal Co.*, 238 U. S. 456, 470 (1915); *Minneapolis National Bank v. Liberty National Bank*, 72 F. 2d 434, 436 (C.C.A. 10, 1934); and *Armour & Co. v. Lambdin*, 154 Fla. 86, 16 So. 2d 805, 810 (1944).

Moreover, this case does not present the ordinary election of inconsistent remedies situation. There was here not just the inconsistency of the remedies and the election to follow one of them. Here, Price elected to follow a statutory remedy which, by its own terms, provided the resulting award would be "final and binding," *a fortiori*, such an election must be held effective and conclusive and bars the right to initiate the common law remedy. *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448, 458 (1933).

III. JUDICIAL REVIEW OF AN AWARD OF THE ADJUSTMENT BOARD, EXCEPT IN THE MANNER PROVIDED, IS CONTRARY TO THE BASIC THEORY AND PURPOSE OF THE RAILWAY LABOR ACT.

Prior to the 1934 amendments to the Railway Labor Act, the parties were free at all times to go to court to settle their minor disputes or grievances. *Elgin, J. & E.*

R. Co. v. Burley, 325 U. S. 711, 725 (1945). This Court has many times recognized that the passage of the Railway Labor Act was intended to and did in fact necessarily limit the rights of the parties to resort to court actions in bringing about settlement of their minor disputes. *Slocum v. D. L. & W. R. R. Co.*, 339 U. S. 239 (1950); *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255 (1950); *Order of Railway Conductors, et al., v. Pitney, et al.*, 326 U. S. 561 (1946); and *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (App. D. C. 1941), affirmed *per curiam* 319 U. S. 732 (1943). See, also, *Railroad Trainmen v. Chicago River R. R.*, 353 U. S. 30 (1957) and *State of California v. Taylor*, 353 U. S. 553 (1957).

In the *Pitney* case, *supra*, the Court said that Congress in the Railway Labor Act intended to leave a "minimum responsibility" to the courts. The only provision for judicial review of Adjustment Board awards is with regard to affirmative awards which are in favor of the petitioning party before the Board. If a railroad fails to comply with an award, provision is made for an enforcement action to be brought in a United States District Court. Section 3, First (p).

In the Report of the Attorney General's Committee on Administrative Procedure, it is stated:

> "The judicial review is thus at the instance of the winning party and never at the instance of the losing party, since the only provision is for a suit to enforce the award." The Attorney General's Committee on Administrative Procedure, Railway Labor: The National Railroad Adjustment Board and the National Mediation Board (Monograph No. 17, 1941), p. 13.

This was also the understanding of the railroad labor organizations. In the brief filed in behalf of the Railway Labor Executives' Association with the Attorney General's Committee on Administrative Procedure, the following is found:

> "It must be remembered, however, that the employee claimant, if he loses before the Board has no right to review at all." Collected in Jones, Harry E., Inquiry of the Atty. Gen. Comm. Ad. Proc. Relating to the National Railroad Adjustment Board (1940) at page 355.

The specification by Congress of a particular administrative or judicial remedy has been generally held to be an exclusive procedure. *Wilder Mfg. Co. v. Corn Products Refg. Co.*, 236 U. S. 165, 174 (1915); *United States v. Babcock*, 250 U. S. 328, 331 (1919); *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 404 (1940); *Switchmen's Union v. Nat. Med. Bd.*, 320 U. S. 297, 301 (1943); and *Yakus v. United States*, 321 U. S. 414 (1944). And where a particular judicial remedy for the review of administrative action has been specified, other remedies are precluded thereby. *Madden v. Brotherhood and Union of Tr. Emp.*, 147 F. 2d 439, 442 (C.C.A. 4, 1945); and *Yakus v. United States, supra.*

The foregoing principles have been most strictly applied to railroad labor disputes and considering the history of the Railway Labor Act, this is not surprising. From the earliest, this Court has emphasized that in railroad labor disputes under the present Railway Labor Act the only manner in which the courts have any jurisdiction is by the specific judicial procedures spelled out in the Act. Except for the judicial remedies there provided, there were to be none.

In the *Switchmen's Union* case, *supra,* that union challenged the certification by the National Mediation Board, under Section 2, Ninth of the Railway Labor Act, of the Brotherhood of Railroad Trainmen as collective bargaining representative of the yardmen on the New York Central. The Switchmen's Union specifically complained of the Board's designating all yardmen to be participants in the election and sought the cancellation of the Board's certificate.

This Court held that the District Court was without jurisdiction to review the Board's action in issuing the certificate and that it was up to Congress to decide whether judicial review should have been provided to protect rights provided under the Act. The Court pointed to the fact that Congress had provided no general provision for judicial review under the Act; that review was provided for in but two situations, in the enforcement of affirmative Board awards and in the enforcement of arbitration awards under Section 9. The Court said:

> "* * * Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (320 U: S. 297, 302).

To the same effect are *General Committee v. M. K. T. R. Co.,* 320 U. S. 323 (1943) and *General Committee v. Southern Pac. Co.,* 320 U. S. 338 (1943). See, also, *Radio Officers Union v. Nat. Med. Bd.,* 181 F. 2d 801, 802 (C.A. D.C., 1950).

The erroneous action of the court below was premised on an invalid conclusion that the court below had jurisdiction to judicially review and hold the Board award invalid or ineffective. This represents a situation with

reference to the administration of a statute which this Court has repeatedly and uniformly held dictates a minimum judicial function and, except where expressly provided, no function at all.

IV. JUDICIAL REVIEW OF DENIAL ADJUSTMENT BOARD AWARDS CAN LEAD ONLY TO FURTHER DISPUTES AND EXTENSIVE LITIGATION IN RAILROAD LABOR CASES.

United States District Courts, according to the court below, are empowered to inquire into and review the "grounds relied upon" by the Board in making a denial award. Based on such review, the courts are to decide whether the denial award is to be final and binding on the parties depending on what the courts determine to be the "merits" of the dispute submitted to the Board and whether such courts believe the Board considered and passed upon such "merits." Such a holding would nullify the finality provisions of the Act and open the door to judicial review of the merits of Board denial awards, with consequent confusion and litigation. How many times the door will be opened will depend only on the ingenuity of lawyers representing hopeful litigants.

If the decision below is sustained and its principle fully exploited, numerous denial Board awards will be subject to judicial review.[6] In the railroad industry, almost all collective bargaining agreements covering all classes of employes contain provisions prescribing certain time limitations which must be followed in the progression and handling of disputes, including discharge cases, both in the handling on the property and before

6 In this case, respondent Price is given another opportunity after an unsuccessful try at the Adjustment Board and the petitioner will be forced to relitigate a wrongful discharge dispute which is now nine years old.

the Board as well.[7] Many cases involving discharges are progressed to the Board which have not been handled in accordance with the prescribed time limits. Generally, these are denied or dismissed by the Board solely for that reason. In such cases, the Board properly gives no consideration to the circumstances or so-called merits of the discharge.[8] The decision below permits these employes to bring a court action for damages for wrongful discharge.[9]

This case, itself, furnishes an excellent example of the confusion which can and will follow if a District Court has jurisdiction to review the "grounds relied upon" by the Board in making a denial award. In reviewing the Board decision, the court below misunderstood and misconceived the entire meaning of the Board's findings and award in determining that the Board had failed to pass upon what the court conceived to be the "merits" of Price's dispute with Union Pacific.[10] It was this misconception which led to its holding the award to be without legal effect.

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7 See, for example, National Railroad Adjustment Board, First Division Awards 17439, 17611 and 18056. *Atlantic Coast Line R. Co. v. Pope*, 119 F.2d 39 (C.C.A.4, 1941).

8 See awards cited in preceding footnote.

9 This would be true of the discharge case which was one of the 21 grievances before the Board in the *Chicago River* case, 353 U.S. 30, 32. That dispute was decided by the Board on the basis of the time limit provisions of the agreement. First Division, National Railroad Adjustment Board Award 18214. Under the holding below, that award is not "final and binding", yet it was the finality provision which was at the basis of the decision in *Chicago River*, barring a strike over the same grievance.

10 The court below failed to appreciate what Judge Goodrich pointed out in *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793, 795, 796 (C.A. 3 1951), which was an enforcement action under Section 3, First (p). He said the Board's findings are "a long way from being the neat, definite and precise findings of fact and conclusions of law from the pen of an experienced and conscientious trial judge * * *." But he recognized that it would be "doctrinaire and unrealistic to insist on precise findings of fact."

The Board, in its findings, held that Price's failure to follow orders was "insubordination and merited discipline" (R. 57). The Board could not have made this finding except after considering and rejecting Price's argument that his admitted failure to obey orders was justified. It should be noted that had the Board decided that any one of the contentions advanced by Price in support of his claim was meritorious, the Board would have sustained the claim - awarding Price back pay and reinstatement. Hence, a denial award must be presumed to be a consideration and rejection of all contentions advanced in support of the claim. When the award unambiguously reads "Claim denied," the presumption cannot be rebutted simply by asserting in a collateral attack that the Board's findings are incomplete or unclear, or the result of a misunderstanding on the part of the Board (R. 105).

After disposing of the so-called merit issue, the only remaining question for the Board's review was whether the alleged procedural defect in holding the investigation was sufficient for the Board to disturb the discipline on such grounds. The court's misconception of the Board's decision stems from its attempt to determine what the Board "believed" from a statement made in the findings after the Board had rejected Price's attempted justification for his failure to follow orders that "Thus the only question for review is whether there was substantial compliance with the investigation rule." (R. 57).[11] This statement, the court concluded, showed a

11 This summary disposition of Price's contention that his insubordination was justified must have been made in recognition of the numerous awards of the various divisions of the National Railroad Adjustment Board which hold that in the absence of physical danger, disobedience or refusal to obey instructions is never justified by reason of the em-

(Continued on Next Page)

"misconstruction" of Price's submission to the Board and that the Board had not passed upon what it thought to be the "merit" issue.

It is submitted that this phrase was simply prefatory to the discussion of the alleged procedural defect in the holding of the investigation and does not indicate any failure on the Board's part to consider and pass upon Price's contention that his insubordination was justified. It is a statement that, having found Price's insubordination not justified, the only question left for review by the Board was the alleged agreement violation in the conduct of the hearing.

The Board, in its findings, stated:

> "* * * Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline" (R. 57).

The court below said (R. 105) this language was a conclusion of the superintendent and not the Board. While this was the superintendent's conclusion, that does not mean it was not also the finding of the Board. The fact that the Board included any reference to this aspect of the case demonstrates it was considered. The Board's

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(Footnote 11 Continued)

ployes belief that such instructions violate the provisions of the collective bargaining agreement. For example, First Division, National Railroad Adjustment Board, Award 12877 (Referee George E. Bushnell) holds: "* * * employes may not interpret an agreement in accordance with their own version of its meaning, but must obey orders and then seek redress under the terms of the agreement." See, also, First Division, National Railroad Adjustment Board, Awards 9217 (Referee James H. Wolfe); 16111 (Referee Mart J. O'Malley); 17701 (Referee Thomas C. Begley); and Third Division, National Railroad Adjustment Board, Award 3218 (Referee Edward F. Carter). In this case, the Board said: "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders." (R. 57).

failure to evidence any disagreement with the conclusion of the railroad officials, coupled with the denial award, conclusively demonstrates that the Board agreed with, or at least adopted or affirmed, the action of the railroad officials.

This meaning of the award has been substantiated by the Board, itself. On November 26, 1958, at the petitioner's request, the First Division of the Board (with Referee A. Langley Coffey) made an interpretation of Award 15509.[12] The request for an interpretation was filed pursuant to Section 3, First (m) of the Railway Labor Act. A copy of the interpretation is attached as Appendix B. (See *infra*, p. 10a). The Board in its interpretation said:

> "The last sentence of this paragraph reading, 'This was insubordination and merited discipline,' shows the Board considered and rejected the argument that claimant's refusal to follow orders was not insubordination." (*Infra*, p. 11a).

The Board also said in its interpretation that its denial award "indicated" that the Board had considered and rejected every argument in support of the claim on behalf of Price and that such denial award "constituted final disposition of the controversy. * * *" (*Infra*, p. 11a).

What may appear to be the "merits" of a dispute to one judge may not be considered to be such by an-

12 This is not shown in the record herein because the interpretation was rendered after the decision below.

other. For example, the court might have concluded the "merits" of this dispute to be Price's contention that the collective bargaining agreement was violated in that the hearing was not thorough as Price also contended (R. 8). Or it could have decided the "merits" to be the allegation that the agreement was violated with regard to the calling of witnesses (R. 8). Neither of these points was mentioned by the Board in its findings. Under the erroneous approach made by the court below, it could be said that the Board failed to determine the "merits" of the dispute for either of those reasons, as well as for the reason chosen by the court.

Similarly, what may appear to one judge to be a disposition or decision on the merits may appear differently to another judge. In this case, two judges have held that the Board did not pass on what they determined to be the merits, while two other judges (the District Judge and Circuit Judge Healy) were of the opposite opinion. And we have seen what the Board had to say on the matter (Appendix B). The decision below relegates to the realm of speculation and uncertainty an area which the Act plainly intended should be finally determined by the Board, and thus unsettles something which Congress intended to quiet.

CONCLUSION

Petitioner, therefore, respectfully requests this Court to reverse the judgment of the Court of Appeals below and to reinstate the order of the United States District Court for the District of Nevada granting its motion for a summary judgment.

Respectfully submitted,

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